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CURRENT TOPICS.

Can nothing be done to shorten the opinions delivered by our appellate courts? Do our judges realize that every superfluous sentence, every verbose expression, is a tax upon the time and patience of a thousand busy lawyers, not to speak of the useless increase of expense required to embalm the results of such lucrubations in the immortality of printer's ink and paper? It is a tax not like other taxes levied and paid once for all, but an ever recurring burden. What is the real secret reason for these endless, rambling discussions of inconsequential trifles, when the pith and marrow of the controversy might be disposed of in a few pointed sentences? The legitimate fields of the jurist and the legal essayist are, and should be kept, separate and distinct. Is it that our judges are, after all, only half educated in the principles of legal science? or is it that they are actuated by a paltry, selfish vanity, which forgets the interest of the public and of their brethren at the bar in the gratification of an idle dream of judicial eminence? Or can it be (as we have heard it whispered) that this waste of time and ink is, after all, but a sort of pandering on the part of the judges to the supposed expectations of the lawyers engaged in the cause that it should be "exhaustively considered" by the court, i. e., that every idle doubt, or question as to perfectly well established principles of law, which the racked imagination of the brief maker can suggest, shall be resolved and minutely discussed by the court.

Whatever may be the secret of this practice, it can not be otherwise than discreditable to the bench, whether it proceeds from mental confusion, indolence, vanity, or a demagogical desire to stand well with influential members of the profession. That it is wholly unnecessary, is evidenced by the fact that the best considered and most quoted opinions, not only in the past, but even in certain rare instances of to-day, are briefly and tersely expressed. Of course there are cases which call for a full elaboration, but they are exceedingly rare, as will be found from an examination of the decisions of great jurists like Mansfield, Story, Marshall and Kent, and in later days, Cooley, Gray and Chief Justice Waite. We believe that as to the State Supreme Courts, the rule will be found to hold good that the best courts, and those most quoted and respected beyond their own State's limits, are those in which the opinions are shortest on an average. It seems to us that, while nobody can assume to dictate to the judges, still, inasmuch as they are not, and in the nature of things can not be, above legitimate and respectful criticism, it would be both proper and advisable for the respective State bar associations, in those States where the grievance exists, to discuss the matter with a view of calling the attention of their courts, in a proper and respectful manner, to the necessity of a reform in that direction.

The General Term of the New York Supreme Court has reversed the decision of the court below, in the *mandamus* proceedings (commonly known as the freight handlers' Case) by the Attorney-General to compel the New York Central and other railway companies to do their duties as common carriers in receiving and promptly forwarding freight offered for transportation. The defense of the companies was based upon the freight handlers' strike in New York last summer, which, it was averred, prevented the companies from promptly forwarding the freight, without acceding to the demands of the strikers, which could only be done at a loss. The court below held that a *mandamus* would not lie. The Supreme Court, however, holds the contrary; not, as some of the secular press seem to have understood, that the companies are required to do impossibilities, but that the obligations which a common carrier owes to the public, and which forms an important element in the consideration for the granting of his franchise must be fulfilled, even though a hardship results. If, from unforeseen and fortuitous circumstances, a loss results in the performance of his functions as carrier, that loss must be borne by the carrier and not be thrust upon the public. We await the decision of the Court of Appeals upon this important subject with much interest.

EXCUSES FOR NOTICE TO A DRAWER OF A BILL OF EXCHANGE.

If the holder of a bill of exchange wishes to make the drawer of it liable upon his contract to pay, he must give the drawer due notice of dishonor for non-payment; for the obligation of the latter becomes absolute only upon a strict observance of the holder to make demand and give due notice. But the drawer may expressly or impliedly dispense with notice of dishonor, and thereby create an absolute undertaking on his part; and when such undertaking is shown to exist, the reason for the rule requiring notice ceases. And, "the reason for notice failing, the necessity of giving it is superseded." [1] This applies equally as well to a class of cases that does not strictly belong to those under the head of waiver, but in the nature of one; and the two establish an exception to the rule.

Notice of dishonor is dispensed with in cases where the drawer of a bill of exchange has no funds or effects in the hands of the drawee,[2] and has no reasonable expectation of having any when the bill matures,[3] or where he withdraws, or intercepts the transmission of funds [4] to be appropriated for the payment of the bill. The substantial ground upon which this doctrine is said to rest, is that of fraud.[5] Of course, if the drawee have no effects to draw against, he commits a fraud by the act of drawing; and no binding contract having been made, he can not invoke the exception, much less the rule, in his aid.

[1] Hoffman v. Smith, 1 Caines, 157.

[2] Kingsley v. Robinson, 21 Pick. 327; Kupfer v. Bank of Galena, 34 Ill. 328; Wollenwebber v. Ketterlinas, 17 Pa. St. 389; Miser v. Trovinger, 7 Ohio St. 281; Youngue v. Ruff, 3 Strob. 311; Oliver v. Bank of Tennessee, 11 Humph. 74; French v. Bank of Columbia, 4 Cranch, 153; Tarver v. Nance, 5 Ala. 712; Patton v. Atkinson, 1 Ired. 262; Farmer's Bank v. Van Meter, 4 Rand. 553.

[3] Cathell v. Goodwin, 1 Har. & J. 468; Orear v. McDonald, 9 Gill. 350; Walker v. Rogers, 40 Ill. 278; Dickens v. Beal, 10 Pet. 572; Adams v. Darby, 28 Mo. 162; Blankenship v. Rogers, 10 Ind. 333; Hill v. Norris, 2 Stew. & P. 114; Robinson v. Ames, 20 Johns. 146; La Coste v. Harper, 3 La. An. 285; Gillespie v. Commack, Id. 248; Mobley v. Clark, 28 Barb. 390; Sargent v. Appleton, 6 Mass. 85; Eichelber v. Finley, 7 Har. & J. 381; Hopkirk v. Page, 2 Bro. C. C. 20.

[4] Valk v. Simmons, 4 Mason, 118; Sutcliffe v. Bird, 2 Nott. & M. 251; Lilley v. Miller, Id. 257; Spangler v. McDaniel, 3 Ind. 275.

[5] Miser v. Trovinger, *supra*.

But with regard to reasonable expectations of payment, Dorsey, J., in Cathell v. Goodwin, said: "The reasonable grounds required by law are not such as would excite an idle hope, a wild expectation, or a remote probability, but such as create a full expectation, a strong probability of payment; such, indeed, as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a bill." * * "If, reasoning upon the state of facts connected with the transactions between drawer and drawee as they existed at the time of drawing, he believes his draft will be honored, he is entitled to notice of dishonor." And, the facts being found, the reasonableness of such expectations is a matter of law.[6]

It is also quite manifest that any withdrawal of funds, or any act to prevent them coming to the hands of the drawee, after drawing a bill, is fraudulent.

In Kingsley v. Robinson, the bill was drawn by the defendant for his accommodation, he having no funds in the drawee's hands Shaw, C. J., said: "If it appear that the drawer had no effects in the hands of the drawee from the time the bill was drawn until the time it became due, he is liable without proof of demand and notice of non-payment. But this is to be taken with some exceptions of special cases, where the drawee has something equivalent to effects, or has made an express or implied engagement to accept and pay, or the drawer has any grounds a reasonable expectation that the bill will be accepted and paid." Seasonable notice was not given, but judgment for the plaintiff was affirmed.

In Hopkirk v. Page, the defendant's intestate drew two bills of exchange which were protested, but no notice was given to the defendant or his intestate. On one of them it was decided that there was reasonable expectation of its payment, when it was drawn, as it appeared from the transactions brought out in evidence; but as to the other, it was largely in excess of the balance known by the drawer to be due to him from the drawee; and it was held that there was no reason to have expected payment of it. In delivering judgment, Marshall, C. J., said: "Where all the transactions between the parties have

[6] Orear v. McDonald, *supra*; Walker v. Stetson, 14 Ohio St. 89.

ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in, were he the debtor in the same sum."[7] But a consignment from drawer to drawee drawn upon before the goods are received; a draft upon goods in transit, where the bill of lading was omitted to be sent, or the goods are lost, or the drawee has effects belonging to the drawer; or there is a fluctuating balance between drawer and drawee; or if there be a running account between them; in such cases there can be no fraud.[8] There must be some fair pretense for drawing, says the court in French v. Bank of Columbia. And it adds: "Where one draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or equitable demand in consequence of the non-payment of the bill. But if it is drawn for the benefit of the acceptor, it is the same as if the drawer had funds in the hands of the drawee." And where the drawer of a check does not suffer injury by the non-payment of it, and negligence be attributable to him alone, he is not entitled to notice of dishonor.[9] Accordingly, where an action was brought in assumpsit on an account, the amount of which had been drawn against by the defendant in favor of the plaintiff and the draft denied because of want of funds, the plaintiff failed in the action because he had not surrendered the bill to the defendant before suit.[10] But where the drawer refused to accept because there had been a fall in the price of cotton, making the account between him and the drawer in favor of the former, due notice of dishonor was necessary.[11] So, too, where funds were attached after drawing a bill of exchange against them, and before presentment of it.[12]

The fact that the drawer of a bill is an infant will not dispense with notice of dishonor.[13] But otherwise if the drawee be a fictitious person. And where the account drawn against is a subject for litigation between the parties the drawer is entitled to notice.[14]

It may be difficult to find a test applicable to all cases coming within the exception to the rule; but it is believed a close approximation to one can be deduced from the decisions on the subject. There can be no doubt that the doctrine of fraud will apply to all cases where the drawer is a mere accommodated party to a bill; or, in cases where he sequesters the funds or effects drawn against. And it is manifest, in such instances, that he has no reason to believe that his draft will be honored. It does not follow that because A has accepted for the accommodation of B on several occasions that he is justified in drawing on A again in the same manner. The mere belief in being accommodated as heretofore, nothing further appearing, falls short of a sufficient reason for drawing. It is a fact that the cases show in all instances that, under the circumstances of each, the drawer may or may not be injured by want of notice of non-payment. If he has committed a fraudulent act, he can not be injured by it; for he knew that he had no right to do it. And if he makes an arrangement with the holder by which, in legal contemplation, he is supposed to have protected his rights, he being presumed to know the law, he can not plead ignorance of it when he is sought to be holden upon an absolute undertaking which appears from the facts. His original undertaking was conditional, and he was presumed to know it, and having bargained it away he is precluded from denying it. Therefore, when one firm draws upon another, both having a common partner, demand for payment is presumed, and knowledge of non-payment is imputed to the partnership drawers. And it makes no difference if all the partners are in insolvency.[16]

So, between accommodation indorsers notice of dishonor is unnecessary.[17] But joint

[7] Blankenskip v. Rogers, *supra; cf.* La Coste v. Harper, *supra*.
[8] Dickens v. Beal, *supra*.
[9] In the matter of Brown, 2 Story, 502.
[10] Patton v. Atkinson, 1 Ired. 262.
[11] Robinson v. Ames, 20 Johns. 146.
[12] Stanton v. Blossom, 14 Mass. 116.
[13] Wyman v. Adams, 12 Cush. 210.
[14] Dolifus v. Frosch, 1 Denio, 367; *Cf.* Benoist v. Creditors, 9 La. (N. S.)685.
[15] New York, etc. Co. v. Selma Bank, 5 Ala. 305; Miser v. Trovinger, *supra;* Rhett v. Poe, 3 How. (U. S.) 457. See Dwight v. Scovill, 2 Conn. 654.
[16] Fuller v. Hooper, 3 Gray, 334.
[17] Fulton v. McCracken, 18 Md. 528.

drawers of a promissory note made for the accommodation of one of them, are all entitled to notice of dishonor, except the accommodated party.[18] Notice to one of them is not notice to the other, and they are not agents for each other. Joint drawers for the accommodation of another party must have due notice of dishonor of a bill, and this is true of every accommodation party,[19] for he might be injured without notice, unless such notice is waived by them. So where the accommodation party to a promissory note requested a renewal of it, which was agreed upon by all the parties in interest, and the note was left with him for his signature which he finally refused to give, it was held that he had waived notice of non-payment of the original note.[20] The court, in deciding the case of Miser v. Trovinger, say that the fact that a drawer has not been injured, is no test of the right to withhold notice of dishonor. But suppose no notice to have been given, and the drawer is called upon to pay a bill drawn by him for the benefit of another (the accommodated) party, a long time after maturity, and his opportunity to secure himself against the principal party has been lost by the bankruptcy of such party, when it would not have been lost by having due knowledge that the drawer would be expected to pay the bill, might not be injured? It was so held where a drawer had sent a statement of account between him and the drawer, to the latter, a long time before drawing on him, which account he never questioned, but he refused to pay the bill which was drawn in good faith. The court say, that where want of notice may be injurious to the interests of the drawer, he is entitled to notice of dishonor, for proofs against the drawee may be weakened by time or some statute of limitation may bar an action against him.[21]

A drawer may be injured whenever he is entitled to due notice of demand and non-payment. The court, in deciding the case of French v. Bank of Columbia, said that the party for whose benefit a bill of exchange is drawn, is the one who expects to pay it. He is the party primarily liable, and therefore the principal debtor.[22] If he be an accommodated party, he is the principal. If he, by agreement, express or implied, makes himself a principal, *i. e.*, disposes of the right to have due notice of dishonor, he, no doubt, has been benefited by the engagement. And in either case he can not be injured legally. There is a presumption of funds in the hands of a drawee;[23] but the burden of proof is upon the holder to show the peculiar circumstances that entitle him to maintain his action.[24] And in an action against the drawer, the pleadings must allege that the bill was drawn for his benefit, or it is demurrable.[25]

A waiver of notice is a question to be determined by a jury from the particular facts.[26] But substituting a conditional for an absolute acceptance by the holder of a bill, does not amount to a waiver of notice.[27]

The maker of a note made for the accomdation of the payee, was indebted to the latter at the time of making the note; but the payee agreed with the maker to take care of the note when it fell due. It was held that the payee, as indorser, was not entitled to notice for non-payment.[28] So, too, where the drawer and holder of a bill agreed that the former should take it in return if the latter could not use it to pay his indebtedness.[29]

Any promise, express or implied, made by the drawer of a bill of exchange to the holder of it, to pay him, either before or after maturity, amounts to a waiver of notice.[30] But a qualified promise is insufficient.[31] And where a promise is made after maturity of a

18 Miser v. Trovinger, *supra*.
19 Sherrod v. Rhodes, 5 Ala. 683.
20 First Nat. Bank v. Ryerson, 23 Iowa, 508.
21 Welch v. Taylor Mfg. Co., 82 Ill. 9.

22 Reed v. Morrison, 2 W. & S. 401; La Coste v. Harper, *supra;* Howard v. Jarvis, 5 Sneed, 375, *et passim*.
23 Baxter v. Graves, 2 Marsh. 152; Merchants' Bank, etc. v. Easley, 44 Mo. 286.
24 Ralston v. Bullits, 3 Bibb, 261; Louisiana St. Bank v. Buhler, 22 La. An. 84; Mehlberg v. Tisher, 24 Wisc. 607; Dunbar v. Tyler, 44 Miss. 1; Howard v. Jarvis, *supra;* McRae v. Rhodes, 22 Ark. 315; Ritchie v. McCoy, 13 Sm. & M. 541; Edwards v. Tandy, 36 N. H. 540; Barkalow v. Johnson, 1 Harris, 397; *Vide* Merchants' Bank of St. Louis v. Easley, 44 Mo. 286.
25 Howard v. Jarvis, *supra*.
26 Carmichael v. Bk. of Pennsylvania, 4 How. (Miss.) 567; Union Bank of Georgetown v. Magruder, 7 Pet. 287; Wood v. Price, 46 Ill. 436; Savage v. Merle, 5 Pick. 88.
27 Campbell v. Pettingill, 7 Greenl. 126.
28 Torrey v. Foss, 40 Me. 74.
29 Wood v. Bailey, 46 Ill. 436.
30 Kupfer v. Bank of Galena, 34 Ill. 328; Benoist v. Creditors, *supra*; Tucker Mfg Co. v. Fairbanks, 98 Mass. 101; Hopkins v. Liswell, 12 Mass. 52.
31 Wood v. Bailey, 12 Iowa, 43.

bill, it is evidence of due presentment if the holder is not guilty of laches. [32]

In Tucker Mfg Co. v. Fairbanks, the drawers requested the payee not to forward the bill to the drawees, as it would be paid at a bank at the place of drawing it; on being told by the payee that it was at a certain bank when due, the drawers said it would not be paid. It was held to be sufficient evidence of a waiver. But such promise must be made with the full knowledge of the drawer that due demand has been made and payment refused.[33] An admission of liability is insufficient to charge the drawer, but it is competent evidence of a waiver.[34] And an acknowledgment of indebtedness stands upon the same ground;[35] as where an indorser said that he had no confidence in the maker, and that he expected the draft would be sent to him for collection. It follows that any subsequent promise to pay a draft, made by the drawer in ignorance of the facts necessary to hold him on his original promise, can not be enforced.[36] He is entitled to some positive action on the part of the holder; and, although it may fail to accomplish the letter of the condition imposed upon him, yet it may fully come within the spirit of it. Such notice under the existing state of facts as the law requires will fix the rights of the holder.[37] But it may be impossible to give due notice of dishonor, owing to the existence of hostilities between the States or countries of which the drawer and holder are inhabitants. In such instances notice is suspended until commercial intercourse is allowed. [38]

Taking mere security by the drawer will not excuse notice of dishonor to him.[39] But if it be taken as an indemnity for the purpose of paying the debt, it operates as a waiver of notice.[40] Where an indorser wrote a letter to the holder of a bill asking for time in which to pay it, and saying that security had been provided to protect it, and that none other could be had by suing, it was held to amount to a waiver of notice by him. [41]

It is said that the doctrine of no funds or effects must not be extended to an indorser; but it would seem to apply where he is an accommodated party to a bill of exchange. Whoever, by words or acts, makes himself a principal debtor, as a party to a bill of exchange, is not entitled to notice of dishonor for non-payment.

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[32] Tibbetts v. Dowd, 23 Wend. 379; Cram v. Sherburne, 14 Me. 48; Hazard v. White, 26 Ark. 155.

[33] Walker v. Rogers, 40 Ill. 278; Beek v. Thompson, 4 Har. & J. 531; Thornton v. Wynn, 12 Wheat. 183; Moore v. Tucker, 3 Ired. 347; Taber v. Berley, 26 Ill. 426; Tibbetts v. Dowd, *supra*.

[34] Porter v. Hoedenpuyl, 9 Mich. 11; Cram v. Sherburne, *supra*.

[35] Gawtry v. Doane, 48 Barb. 148; United States Bank v. Southard, 2 Harris, 473.

[36] Otis v. Hussey, 3 N. H. 46; Baskerville v. Harris, 41 Miss. 535; Hazard v. White, *supra;* Harrison v. Bailey, 99 Mass. 620; Hunt v. Wadleigh, 26 Me. 271.

[37] Merchants' Bank v. Birch, 17 John. 25.

[38] Hopkirk v. Page, 2 Bro. C. C. 34; House v. Adams, 48 Pa. St. 261; Apperson v. Union Bank, 4 Cold. 445; Polk v. Spinks, 5 Cold. 431; Morgan v. Bank of Louisville, 4 Bush, 82.

[39] Spencer v. Harvey, 17 Wend. 489; Oswego Bank v. Knower, Hill & Denio, 122.

[40] Wilson v. Senier, 14 Wis. 386; Woodbury v. Crum 1 Biss. C. C. 284.

[41] Spencer v. Harvey, *supra*.

FILTHY PERCOLATIONS.

It is said in an early case that where one has filthy deposits on his premises, he, whose dirt it is must keep it that it may not trespass.[1] If filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbor's cellar, or finds its way into his well, it is a nuisance.[2] To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below it, is of itself actionable tort. Under such circumstances, the reasonable precaution which the law requires, is effectually to exclude the filth from the neighbor's land, and not to do so is of itself negligence.[3] It is only sudden and unavoidable accidents,

[1] Tenant v. Goldwin, 1 Salk. 360; S. C., 6 Mod. 311.

[2] Tenant v. Goldwin, *supra;* Ball v. Nye, 99 Mass. 582; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; St. Helens Chemical Co. v. St. Helens, L. R. 1 Exch. Div. 196; Marshall v. Cohen, 44 Ga. 489; S. C., 9 Am. Rep. 170; Pottstown Gas Co. v Murphy, 39 Pa. St. 257; Tate v. Parish, 7 T. B. Mon. 325; Green. v. Nunnemacher, 36 Wis. 50.

[3] Ball v. Nye, *supra*; Hodgkinson v. Ennor, 4 B. & S. 229.

that could not have been foreseen or guarded against by due care, that can excuse a party from liability. Injuries from extraordinary accidental circumstances, for which no one is at fault, must be left to be borne by those on whom they fall.[4] The soil of a man's estate may be rendered cold and unproductive, or the walls of his building weakened and made damp and unhealthy, and, in various other ways, his property injured for use or occupation by the percolation of water beneath the surface caused by some wrongful act of another. The wrongful act may, perhaps, be thawing water from one's roof so near the boundary line that it must escape upon adjacent premises.[5] And it makes no difference whether damage is occasioned by the overflow of, or the percolation through, the natural bank, so long as the result is occasioned by an improper interference with the natural flow of the water.[6] The right of one to be secure against the undermining of his building by water, or the destruction of his crops or the poisoning of the air by stealthy attacks of an unforeseen element is as complete as his right to be protected against open personal assault or the more demonstrative but not more destructive trespass of animals.[7]

If one purchases land from another on which the vendor has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable, after knowledge thereof, for all damages sustained by the other.[8] But if one gathers water into a reservoir where its escape would be injurious to others, he must, at his peril, make sure that the reservoir is sufficient to retain the water which is gathered into it. If it be sufficiently constructed, the liability is only a question of negligence. The proprietor is not liable if the water escapes beyond the observance of due care proportioned to the danger of injury from the safety and mode of construction of the reservoir.[9]

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4 Underwood v. Waldron, 33 Mich. 232.
5 Bellows v. Sackett, 15 Barb. 96.
6 Prexley v. Clark, 35 N. Y. 520.
7 Broder v. Saillan, 2 Ch. Div. 692.
8 Hurdman v. Northeastern R. Co., 6 Cent. L. J. 367.
9 Grey v. Harris, 107 Mass. 492; New York v. Bailey, 2 Dehio, 433.

SHERIFF'S DEED—DEFECTIVE ACKNOWLEDGMENT — AMENDMENT OF RECORD, NUNC PRO TUNC—NOTICE.

LINCOLN v. THOMPSON.

Supreme Court of Missouri.

1. Where a levy upon real estate is made by a sheriff (named Long), and the advertisement and sale is made by his successor in office (named Gittings), and the sheriff's deed is made by the actual sheriff, Gittings, in due form, but the acknowledgment recites that this day comes Long, sheriff of the county, and acknowledges the execution of the deed, such acknowledgment is void, for the court will not presume that the facts are otherwise than as stated in the acknowledgment that the deed was executed by the sheriff who made the sale and acknowledged by his predecessor.

2. A certified copy of a sheriff's deed, so defectively acknowledged, can not be subsequently acknowledged *nunc pro tunc* by the officer who actually made it.

3. SHERWOOD, C. J., *dissentiente*: 1. The burden of proof is upon one claiming as an innocent purchaser without notice, and it is not sufficient for him to allege that he had any "claim by defendant" under a certain sheriff's deed to him, but he must disclaim notice of the *existence* of the deed. 2. Where plaintiff disclaims notice of a sheriff's deed, and it appears that his brother, an attorney-at-law, who had sometimes acted as his counsel, and who was, at that time, without being specially authorized, attempting to make the judgment out of which plaintiff's claim arose, had knowledge of such deed, such plaintiff ought to be charged with notice of the facts in his brother's possession.

Appeal from Clay County Circuit Court.

The plaintiff, John K. Lincoln, filed his petition in the Circuit Court of Clay County to recover from Emily W. Thompson the tract of land in dispute—about 200 acres. The petition set forth a judgment in execution in favor of Julia A. Lincoln, and a sale of the land thereunder in 18—, as the property of the late Judge Thompson, then husband of said Emily, and who died soon after. The petition averred that Mrs. Thompson held the land in fraud of the plaintiff's rights.

In 1865 the Farmers' Bank and John W. Reed had purchased the same 200 acres of lands under judgment and execution against Judge Thompson, and took a deed from the sheriff in due legal form and effect to convey the land, if properly acknowledged. The certificate of acknowledgment was as follows: "Be it remembered that on the 26th day of April, A. D. 1865, comes Frances R. Long, sheriff of Clay County, in the State of Missouri, and produces a deed executed by himself as sheriff aforesaid, to the Farmers' Bank and John W. Reed jointly, for the following described real estate [description], sold as the property of James T. V. Thompson, and said sheriff acknowledges said deed to be his act and deed for the purposes therein mentioned, and the same is ordered to be certified on said deed accordingly." Said deed was directly recorded.

The record showed that the execution came to the hands of Frances R. Long, at the time sheriff of Clay County; that he, Long, made the levy; that his, Long's, term of office expired, and he turned over the execution and levy to his successor in office, Darius Gittings, who made the sale according to law, and executed the deed, and was the identical person, as Mrs. Thompson claimed, who acknowledged it. But the plaintiff claimed that the deed was acknowledged by Long, the ex-sheriff, and not by Gittings, the sheriff.

The grantees in this sheriff's deed, *viz.*. the Farmer's Bank and Reed, sold and conveyed the same land to Mrs. Thompson, as will be hereafter stated. Prior to 1868, Judge Thompson being largely indebted, caused several conveyances of his property to be made, with intent to secure the same to his wife and children. These conveyances were invalid as against his creditors, and immaterial to the issues in the suit. Afterwards Judge Thompson mortgaged, in good faith, all his real estate, including some 4.000 acres of land in Clay County, for the benefit of his creditors. This mortgage was foreclosed and the property advertised for sale in 1868. Mrs. Thompson had never relinquished her dower to any of this land. It was clearly shown in the testimony that if the land was bought to sale subject to Mrs. Thompson's inchoate right of dower, it would not pay the mortgage debts. The estimates of different witnesses fixed the amount for which it would sell encumbered by the dower right at from $36,000 to $50,000. But, freed of the dower incumbrance, the creditors believed it would sell for enough to pay all the mortgage debts, about $73,-000. The creditors applied to Mrs. Thompson to suffer the land to be sold clear of her dower interest. She consented to do so, and an agreement was drawn up and signed by all the creditors and Mrs. Thompson by which she agreed to free the lands of her dower in consideration of one-sixth of the money received from sales, and the tract above-mentioned sold and conveyed by the sheriff to the bank and Reed. This agreement was lost, but the contents fully proved on the trial. In execution of this agreement, the bank and Reed conveyed to Mrs. Thompson; and the other lands were sold freed of the dower right, and realized about $73,000, one-sixth of which was paid to Mrs. Thompson.

It was represented to Mrs. Thompson that all her husband's creditors had signed the agreement for the relinquishment of her dower. Proclamation, at and before the sale of the lands, was made that an agreement had been made by which she would surrender her dower in all the lands. James E. Lincoln, an attorney and the brother of John K. Lincoln, was present at the sale, heard the proclamation, and purchased a portion of the lands, and received Mrs. Thompson's relinquishment of dower. He had been acting as John K. Lincoln's attorney for several years, using his best efforts to collect the judgmnet of Julia A. Lincoln. The name of Julia A. Lincoln was signed to the dower agreement by James Moss, an attorney. But after his death his authority to do so was denied. After Mrs. Thompson had fully complied with her agreement, and the bank and Reed had conveyed the 200 acre tract to Mrs. Thompson, John K. Lincoln caused the 200 acre tract to be sold under an execution issued on the judgment of Julia A. Lincoln, and received a sheriff's deed in 1870, and commenced this suit on the theory that the sheriff's deed to the bank and Reed was void, because it had not been acknowledged by Gittings, the sheriff, but by Long, the ex-sheriff. He, John K. Lincoln, admitted that he had knowledge of the dower agreement, but he did not know of any written agreement. He claimed to be an innocent purchaser, because he did not know of any claim under the deed to the bank and Reed. On the trial in the circuit court, Darius Gittings, February 25, 1878, appeared in court and acknowledged the execution of the deed by him in due form. The circuit court dismissed the plaintiff's suit, and he appealed to the Supreme Court. Judge Norton, having been of counsel for Mrs. Thompson, did not sit. The court being divided equally, Judge T. T. Gantt, an eminent lawyer, and late a judge of the St. Louis Court of Appeals, was appointed special judge.

Wash. Adams, *Lincoln & Adams*, and *Chas. A. Winslow*, for appellant; *J. E. Merryman* and *Glover & Shepley*, for respondent.

GANTT, Special Judge, delivered the opinion of the court:

The original petition in this cause does not appear in the transcript, but it is admitted that the suit was commenced to the March Term, 1874, of the Clay circuit court, and on December 20, 1877, an amended petition was filed, on which, with the answer thereto and the reply, the cause was tried at the February Term, 1878.

By this amended petition it was charged that James T. V. Thompson was, in 1864, seized of the land in controversy. It contained about 200 acres and may be called the "Thompson Home Place." Under a judgment obtained 2d of May, 1862, which was alleged to have been revived from time to time, the plaintiff received, in September, 1870, a sheriff's deed, duly executed and acknowledged, conveying to him all the interest of said Thompson to this land. The petition went on to state that, in 1864, Thompson, being in embarrassed circumstances, and many unsatisfied judgments standing against him, procured the issue of executions thereunder, and caused one E. C. Tillman, a brother-in-law, at sheriff's sale, the purchaser of this tract of land, and to receive a deed therefor from the sheriff. This deed was dated April 28, 1864; that the money for this purpose was furnished by Thompson, and that on receiving the sheriff's deed Tillman executed an agreement in writing to convey the property to A. J. Calhoun, in trust for Emily W. Thompson, wife, and James P., John D. and Anna R. Thompson, children of said James T. V. Thompson. In 1872,

Tillman made such conveyance accordingly. James T. V. Thompson died in 1872. It was alleged that the deed to Tillman and the conveyance to Calhoun were part of a fraudulent contrivance, on the part of James T. V. Thompson, to secure this real estate to his wife and children in fraud of his creditors, and the plaintiff prayed that the deed might be set aside ane himself put in possession of the land, which had constantly been occupied by Thompson in his life time and by his widow and children since his death. James T. V. Thompson had died. The suit was instituted against Emily W. Thompson, John D. and Anna R. Thompson, and their trustee, A. J. Calhoun.

The trustee and the minor children filed a general denial. Emily W. Thompson answered separately and specially. She denied all the fraud charged in connection with the deed to Tillman, and alleged that the purchase by him was effected with money to her belonging, arising from her separate estate.

Further, she set up a purchase from the Farmers' Bank of Missouri and John W. Reed of this property in 1867. She said that they had purchased it at sheriff's sale from Thompson in April, 1865, and had received therefor a sheriff's deed duly executed and acknowledged. This deed was alleged to be lost, and a copy was filed as an exhibit. It was alleged further that in 1862 Thompson, being largely indebted, had executed a deed of trust or mortgage to A. W. Doniphan and A. J. Calhoun to secure certain of his creditors; that this deed was afterwards foreclosed by the Clay Circuit Court, and a decree made for the sale of the real estate therein described to pay these creditors; that, prior to the making of the decree, Doniphan and Calhoun, together with the judgment creditors of Thompson on the one hand, agreed with Emily W. Thompson on the other, that she should relinquish her dower in all the land sold, and that she should receive in consideration of such relinquishment, one-sixth of the proceeds of the sales, and a deed from the Farmers' Bank of Missouri and John W. Reed, for the Thompson Home Place. This agreement was alleged to have been in writing and signed by the judgment creditors of Thompson, the plaintiff included, but said to have been lost. The answer went on to say that this agreement had been carried out; that defendant had released her dower to all the land sold, thereby much increasing the price realized therefor; that she had received one-sixth of the proceeds, and also from the Farmers' Bank of Missouri and John W. Reed, a conveyance of the Home Place bearing date 31st of October, 1867; that, ever since that time, she had relied on the title thus acquired, holding the property adversely to all the world; that this adverse possession had continued uninterruptedly for ten years; and she pleaded this lapse of time as a bar to plaintiff's prayer for relief.

To this answer plaintiff replied on 28th of February, 1878, having on the 23d moved to strike from it, as inconsistent and antagonistic with the defense of the Tillman transaction, all that was said respecting the acquisition of the title of the Farmers' Bank of Missouri and John W. Reed. He denied the making of a deed by the sheriff to these grantors; denied the existence of the judgment, and the making of the sale alleged to have occurred in April, 1865; the execution and acknowledgment of the sheriff's deed. It is stated in the transcript that the case was called for trial on the 2nd of March, 1878. This seems to be a clerical error, for the second day of the trial appears to have been March 1, 1878. The plaintiff put in evidence the sheriff's deed to him. There was some discussion as to the revival of the judgment under which this deed was made so as to preserve the lien of it from the day when it was rendered.

The circuit court held that an unbroken lien had not been preserved. No error is seen in this ruling, but it does not affect the conclusion reached by this court. The plaintiff then put in evidence the deed to Tillman and his conveyance to Calhoun. He supplemented these with other testimony, which leaves no doubt as to the character of that transaction. The money bid by Tillman was paid by Thompson. Mrs. Thompson had no separate estate, and the conveyances by which she claimed the Home Place under Tillman and Calhoun were void as against the creditors of J. T. V. Thompson. It was proved that the plaintiff was not a party to what may be called the "dower contract." He knew nothing of its tenor, and nothing to impart notice of its existence. At the sale under the foreclosure it was announced that Mrs. Thompson would release her dower to all the land sold under the decree of foreclosure. The defendant offered in evidence what was called a sheriff's deed, purporting to have been made pursuant to a sale of all Jas. T. V. Thompson's interest in the Home Place on the 26th of April, 1865. There was a subsisting and unsatisfied judgment against Thompson, on which an execution was issued June 2, 1864, and placed in the hands of Francis R. Long, sheriff of Clay County, on June 5, 1864. He levied this writ on the Home Place. Apparently Long was succeeded in office by Darius Gittings, but when the one ceased to be, and the other became, sheriff, does not appear. Gettings seems to have made sale of the Home Place under this writ in April, 1865, under the levy previously made in 1864 by Long. He executed a deed reciting the judgment, execution and advertisement and sale on April 26, and judgment from the only indicia before us Long on that day produced this deed in court, claimed that he had executed it as sheriff, and acknowledged it. This paper itself was not produced, it was alleged to have been lost, a copy, or what professed to be a copy, from the books of the recorder of deeds for Clay County was produced and seems to have been unchallenged, so far as it claims to be a copy of the deed now concerned. How it came to be admitted to

record by the recorder of deeds we are not told, nor when this occurred. There is a memorandum under the clerk's certificate of the acknowledgment by Long, that it "was filed April 27, 1865," but there is nothing to show who made this memorandum. This paper can with no propriety be called a sheriff's deed, for until such an instrument has been executed, acknowledged and certified as the law directs, it has no validity. The plaintiff objected to it for these reasons, and the circuit court sustained the objection. The defendant then asked to be allowed to have this assumed copy acknowledged *nunc pro tunc* by Darius Gittings, late sheriff of Clay County, present in court, and this the court permitted, and allowed the instrument thus acknowledged to be read, against the exception of the plaintiff. Up to this time the only certificate on the paper was in the following terms:

STATE OF MISSOURI, } *ss.*
COUNTY OF CLAY, }

"Among the records and proceedings of the circuit court, began and held at the Court House in the city of Liberty, in the County of Clay, on the 26th of April, 1865, and on the third day of said term the following were had, to wit: Be it remembered that, on this 26th day of April, 1865, comes Francis R. Long, sheriff of Clay County, in the State of Missouri, and produces a deed executed by himself as sheriff as aforesaid to the Farmer's Bank of Missouri and John W. Reed jointly for the following described real estate" (here follows the description) "and said sheriff acknowledges said deed to be his act and deed for the uses and purposes therein mentioned, and the same is ordered to be certified on said deed accordingly." Then follows a certificate by the clerk under the seal of court declaring the foregoing to be a full, true and perfect copy of the acknowledgment by the sheriff in open court, below which appears the words, "Filed 27th April, 1865," without more. On the 9th of January, 1878, the recorder of deeds for Clay County certified this paper to be truly copied from his records.

The acknowledgment of this paper which the circuit court at the trial permitted Darius Gittings to make, bears date March 1, 1878, and recites that Darius Gittings, late sheriff, etc., produces a deed (not a copy of a deed), executed by him, etc., etc., and acknowledges it accordingly. On the same 1st of March, 1878, Darius Gittings appears to have acknowledged this same paper to be his act and deed. On this occasion he acted as an individual, not as sheriff. The paper thus acknowledged was then read in evidence, against the exception of the plaintiff, and this, being all the evidence, the circuit court dismissed plaintiff's bill. After the usual motions, he appealed to this court.

1. We are struck by the form of the certificate indorsed on both the deeds before us, as well as that relied on by the plaintiff as that adduced by defendant. The law governing the acknowledgment of deeds executed by a sheriff upon the sale of lands under execution, has been unchanged for more than sixty years. The statute has always directed that "the sheriff * * * * executing any deed for land, etc., sold by virtue of any execution, shall acknowledge the execution thereof before the circuit court, * * * * and the clerk of such court shall indorse upon such deed a certificate of such acknowledgment under the seal of the court; *and shall make an entry of such acknowledgment * * * * with the names of the parties* to the suit; and a description of the property thereby conveyed," etc. Sec. 2393 and 2384 Rev. Stats. of 1879. It seems very clear that the first thing to be done by the sheriff after making a sale, is the execution of a deed to the purchaser; but if he stops here, the purchaser may take nothing. An indispensable solemnity is the acknowledgment (or proof) of this deed in open court. The clerk must then certify upon the deed that it has been so acknowledged (or proved), and this certificate must be under the seal of the court.

The deed is then complete and ready for delivery. But the additional duty is laid on the clerk to "make an entry" (upon the records of the court) "of such acknowledgment * * * * *with the names of the parties to the suit, and a description of the property thereby conveyed*," etc.

The words italicised are no part of the acknowledgment; they are something supplemental to it, which the clerk is directed to enter of record. They should not be indorsed upon the deed. The certificate of acknowledgment indorsed upon that instrument is the original, authentic evidence of the act of the sheriff. This certificate can not be aided, if defective in any particular, by reference to the entry upon the record (Samuels v. Shelton, 48 Mo. 444; Adams v. Buchanan, 49 Mo. 64; McClurg v. McClurg, 53 Mo. 173); nor will it be invalidated because that entry is defective. Scroggs v. Scroggs, 41 Mo. 242. Instead of this order being observed in the deeds before us, it would seem that the entry upon the record was first made and that then an order followed that this entry should be certified, or indorsed, on the deed. This is a cumberous, unnecessary and dangerous departure from the directions of the statute. The certificate of acknowledgment indorsed on the deed, and the entry on the record, were not intended by the law-makers to be copies of each other.

The certificate of acknowledgment itself may be, and should be, very brief. It need not, and should not, contain a description of the property conveyed. That is already given with particularity in the body of the deed itself. Neither should it name the parties to the execution under which the sale was made. That also the deed itself shows. But the entry on the record should contain these particulars; first, because the statute so directs; and, second, because their mention on the record answers to an intelligible and useful purpose. The distinction between the certificate indorsed upon the deed, and the entry on the record enjoined upon the clerk, is pointedly shown in Samuels v. Shelton, 48 Mo. 444. The forms of

the certificate adoped in the deed before us, is careless, and, we think, dangerous; but we will not pronounce it so irregular as to be void.

Our opinion as to the deed to Tillman and his conveyance to Calhoun has been already stated in substance. Thompson himself, so far as his creditors are concerned, was the purchaser on this occasion. The deed to Emily W. Thompson from the Farmer's Bank and John W. Reed is a very carefully guarded deed of quit claim, conveying industriously only such title as the grantors had. They do not even cite the deed by which they derived title to the land, but described the property as being the same which was sold to Tillman. On looking at the paper constituting their title,we see that it is neither the deed of sheriff Gittings nor of sheriff Long. The one did not acknowledge, the other did not execute it. It is among the unexplained puzzles of this case how it came to pass that this paper was admitted to record at all. Certainly no law with which we are familiar entitled it to be recorded, or made either the paper itself, or a copy of it, evidence.

What especially excites our curiosity is the evidence by which it was made to appear that this paper was an authentic copy of any thing. Gittings appears to have regarded it as an original document, which it confessedly was not. It was, however, received as a copy of a paper executed by Gittings and acknowledged by Long in 1865, the original being alleged to be lost. And this copy Darius Gittings was permitted to acknowledge as his deed. When he had done this the circuit court seems to have considered that the acknowledgment related back to the 26th of April, 1865.

One difficulty here seems serious. No paper which Gittings had ever seen before was produced, but something purporting to be a copy of a deed executed by him nearly thirteen years before. He declared this paper to be his act and deed, and spoke of having executed it. At most it could only have been a copy of something he had formerly executed.

It seems wholly inadmissible to admit this instrument as evidence of a deed validated by relation, so as to take effect from the 26th of April, 1865. Plaintiff had no notice of the sale of which this deed was the supposed outcome. He was by the most meritorious title a purchaser for value. The execution under which the sale in 1870 was made belonged to him. Any bid made by him, less than the face of the execution, was paid as soon as the hammer of the auctioneer fell. The fact of his being a purchaser for value was indeed admitted by the pleading so, but his relations to the execution, the sheriff's deed and the statutes which requires all sales made by a sheriff to be for cash, renders it undisputable that, at the lowest, it presumably appears that he purchased and paid for the property in question in September, 1870.

It seems also that he had no notice of the sale made in April, 1865. Constructive notice is out of the question. There was nothing having capacity to impart such notice. As to actual notice we see and hear of none, unless the possession of the Home Place by the defendant was sufficient to apprise plaintiff as early as 1870 of this sale in April, 1865. But if we should consider the plaintiff bound to know that defendant claimed under the deed of 31st of October, 1867, an inspection of that document would give him no intimation of the sale made in April, 1865. Reference is in that instrument made to the sheriff's sale to Tillman, but nothing is said of a sale by the sheriff to the Farmer's Bank and John W. Reed.

Possession may, in some cases, be evidence of a claim, but when a particular claim is notorious, and is sufficient to account for a possession, no one is called on to speculate as to the existence of some other claim. We are, therefore, of the opinion, that the deed made in April, 1865 (assuming it to be settled that such a deed was then made), could not be perfected by acknowledgment in 1878 so as to cut out the plaintiff.

He certainly occupies a more advantageous position than was held by Merry in the case of Betts v. Merry, 9 Mo. 514. That case was decided in 1845. It has recently been quoted with approval, and must be regarded as settled law. Strain v. Murphy, 49 Mo. 337. Although, in every conveyance by which Merry claimed the fact of a sale, the defective certificate of which alone gave him any standing, was recited, he was held unaffected by such recital. This decision might be much narrowed without weakening the case of the plaintiff in this suit. It is too familiar to need the citation of authority in its support, that the doctrine of relation is never applied to the injury of an innocent, still less of a meritorious stranger.

It was strenuously argued that the court should read the certificate of the acknowledgment made in 1865 as if the name of Gittings occupied the place of Long. It was urged that the maxim "*Presentia corporis tollit errorem nominis*," required this reading of the certificate. This can only mean that if the court be satisfied that the acknowledgment was really made by Darius Gittings that he, and not Frances R. Long,was bodily present in court when the acknowledgment was taken, then the clerical blunder of miscalling his name is of no consequence, or is cured by the proof before us of his bodily presence. But we fail entirely to perceive any evidence that Gittings and not Long acknowledged the deed on the 26th of April, 1865. All that we know on the subject comes from the certificate of the clerk. Whether we should be at liberty to listen to any other evidence we need not stop to inquire, for absolutely none was offered. Under these circumstances, it would be a startling thing if a court could strike from a legal document an essential and controlling word, completely changing its import. We have no reason whatever for the inference that the clerk made any mistake at all. If we suspected such a thing, we might be embarrassed by the

difficulty presented by a misprision which affected an important interest, but which there might be serious difficulty in correcting. But, as already said, all that we see, all that we hear, and, we may add, all that we fail to hear, leads us to believe, not only as judges, but as individuals, that the matter certified by the clerk is true so far as he declares that Frances R. Long acknowledged the deed we are considering; that it was Long, and not Gittings, who came into court, producing the paper which he certified; and though it is clear a blunder was committed by some one, we are wholly unable to construe this certificate as signifying that the acknowledgment was made by a person whom it does not once mention. It is because we can see no reason for thinking that Gittings was bodily present to the clerk, that we can not obtain any foundation for attempting to cure the supposed error of misnaming him.

There are cases in which a trivial discrepancy in the name of the person executing and the person acknowledging a deed has been reconciled by proof of the identity of the two. If a grantor's name be correctly recited in the body of the deed, and he signs it in his true name but acknowledged it by a wrong name: or when an erroneous name is signed but the right one used in the acknowledgment, the error is cured. Such was the case of Middleton v. Faidla, 25 Cal. 80. There, however, the mistake was very trivial. The deed was executed by Edward Jones. It appears to be acknowledged by Edmond Jones. There was no question but that Edmond and Edward were the same person. Obviously such cases are no guide to us out of the present difficulty. It is certainly true that a person may become bound by any mark or designation he may think proper to adopt (Butchers' & Drovers' Bank v. Brown, 6 Hill, 443), but we have no sort of evidence that any one intended in the certificate before us to use one name for another.

We need not pass upon the defense resting on lapse of time. In 1878 the defendant set up that she had held adversely for ten years and more. But she does not say she had been in adverse possession for ten years when this suit was commenced, and the fact was otherwise. A plea of limitations should always refer to the commencement of proceedings supposed to be barred by lapse of time. If the statutory period then lacks a single day, there is nothing gained by the protraction of litigation for many years beyond the time within which suit should have been commenced.

As to the dower agreement it became irrelevant when it was shown that plaintiff was not a party to it. Doniphan and Calhoun and any number of the creditors of James T. V. Thompson, on the one hand, and Emily W. Thompson on the other, had no power to conclude the rights of any other creditors.

No question appears to arise upon this agreement. The Home Place was not sold under the decree of foreclosure. If, indeed, the Farmer's Bank of Missouri and John W. Reid were the owners of the Home Place, their vendee would hold it against the world, but not by reason of the dower agreement.

Our opinion therefore is that the plaintiff is entitled to the relief he asked, and we reverse the judgment and remand the case, with instructions to the circuit court to make a decree in conformity with the views here expressed.

NORTON, J., did not sit, having been of counsel. HOUGH and HENRY, JJ., concur. SHERWOOD, C. J., and RAY, J., dissent.

SHERWOOD, C. J., dissenting:

I can not subscribe to the foregoing opinion. I regard it as being utterly at variance with many decisions both of this and other courts bearing directly on the questions at issue, besides as being the result of an entire misconception of the facts spread at large upon this record, and the necessary and legitimate inferences arising from such facts. I will briefly give the reasons why I think so:

1. And first, as to the validity of the sheriff's deed to the Farmer's Bank and John W. Reed; so far as the deed itself is concerned, no objection can be taken to it. The point, and the sole point, of objection urged in the circuit court was, that the certificate of acknowledgment does not support and is not in conformity with the deed, because of the fact that the deed was made and signed by Darius Gittings, as sheriff, but acknowledged by Frances R. Long, as sheriff. Let this objection be examined, and see what force it possesses. The deed begins: "To all to whom these presents, shall come, I, Darius Gittings, sheriff of the County of Clay, State of Missouri, send greeting." The deed then, after reciting the judgment rendered, the issuance of execution and its direction to the sheriff of Clay County, and its delivery to "Frances R. Long, then sheriff of said county," states the said execution was by said Long transferred and handed over to me as his successor in the said sheriffality, upon the expiration of his term of office." The deed then recites that a levy of the execution had been made by Long on the property in controversy, among other, and that, after such levy, Long had turned over the execution to Gittings as his successor. The deed also recites that "I, Darius Gittings, sheriff as aforesaid, gave notice of the time and place of sale," and then proceeds in the usual manner to the close, in the name of "Darius Gittings, as sheriff as aforesaid," and is signed and sealed by him. On this deed is indorsed the certificate of acknowledgment already mentioned, which bears the same date as the deed. Now, nothing is better established law than that a court is bound to take judicial notice of its own officers; they will judicially notice their signatures, whether any official designation is added to their signature or not, and will also, when their terms expire. Bliss Code Plead., sec. 199, and cases cited. Taking this legal presumption as a premise, Darius Gittings, who signed and sealed the deed, ac-

knowledged it; for otherwise, in the very teeth of that legal presumption, of that legal knowledge, we must originate a presumption or inference of fact that the Circuit Court of Clay County did not know that Long's term had expired, or that Gitting's term had begun; did not know whether Long was its own officer when he came to acknowledge a deed signed and sealed by Gittings; in short, did not know whether Long was Gittings, or the latter was Long.

If, as the books state, the court knew its own sheriff, knew his signature, is it not a matter of wonder, if plaintiff's position be correct, that the court did not promptly rebuke Long when he came before the court to acknowledge the deed signed by Gittings, in which Long is referred to as the former and Gittings the present sheriff?

This question answers itself, and shows the supreme necessity of using in investigations of this character, not only some knowledge of the law of evidence, but also common sense. And until you can overthrow the legal presumption that the court knew its own sheriff, you are bound to conclude that the insertion of Long's name in the certificate, instead of that of Gittings, was a mere misprision of the clerk; a mere error in the name, and not in the man; and so the misnomer should work no hurt. The maxim, "*Præsentia corporis tollit errorem nominis*," applies here, and was applied in England recently, in an important criminal case, where a juror was addressed by, and answered to, the wrong name and afterwards sworn, and, upon a case reserved, the court said: "The mistake is not a mistake of the man, but only of his name * * * * at the bottom the objection is but this, that the officer of the court, the jury man being present, called and addressed him by a wrong name. Now it is an old and rational maxim of law, that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. *Præsentia corporis tollit errorem nominis*. Reg. v. Mellor, 27 L. J. M. C. 121.

Take another view of the certificate of acknowledgment. The body of the deed may be referred to support the certificate. Martindale on Conveyancing, sec 559. In Samuels v. Sheldon, 48 Mo. 444, the certificate of the clerk indorsed on the deed was the following: "Andrew Beaty, sheriff of said county, appeared in open court and acknowledged that he executed and delivered a deed to David Mulanix as his voluntary act and deed, for the uses and purposes therein expressed." And Wagner, J., after stating that "the deed itself must contain the necessary certificate, and a defective certificate of acknowledgment can not be sustained or helped by a resort to extraneous testimony, proceeds to say: "The only objection that can be plausibly urged against this certificate is that it does not specifically refer to the conveyance, but uses the phrase 'a deed.' This is without doubt a mere clerical error. The deeds sets out the execution, the transcript and sale, and the purchase by Mulanix, and the certificate of acknowledgment is placed on this deed by the clerk. It obviously refers to this deed and no other, and the mere inadvertance or clerical error of the officer making the indorsement ought not to be permitted to invalidate it. * * * * The intention is sufficiently clear on the face of the paper." That case undoubtedly shows two things: 1st. That the deed is not regarded in cases of this sort as extrinsic evidence; and 2d, that it may be legitimately resorted to, to cure and correct any mere clerical error and inadvertance in the certificate, which, but for such resort and reference, would be left uncertain and ambiguous. That case is approvingly cited in McClure v. McClurg, 53 Mo. 173. So also, in Carpenter v. Dexter, 8 Wall. 515, it was held that in aid of the certificate of acknowledgment, reference may be had to the deed or any part thereof. So also in Chandler v. Spear, 22 Vt. 388, where the grantor's name was Richard G. Bailey, but the certificate of acknowledgment showed an acknowledgment in the name of "Richard G.," and it was ruled that as it appeared from an inspection of the whole instrument with reasonable certainty that it was acknowledged by Richard G. Bailey, the grantor, that was sufficient. Similar rulings were made in Bradford v. Dawson, 2 Ala. 203, and Sharpe v. Orme, 61 Ind. 263. The court there say that, "the only general rule with respect to the construction of these certificates, when the object is to support the registration, is that when the statute has been substantially complied with, the rights of the parties shall not depend on strict criticism, but that any portion of the deed may be examined to give effect and meaning to a certificate which is apparently defective." And the court further say: "The material fact is, that the grantors acknowledged the execution of the conveyance, and whenever this case be fairly and reasonably spelled out from the certificate, the requisitions of the law are satisfied. When this certificate is read in connection with the deed, the fact appears with certainty." To the same effect is Wells v. Atkinson, 24 Minn. 161, where the court say, in reference to certificates of acknowledgment: "It is the policy of the law to uphold them, whenever substance is found, and not suffer them to be defeated by the technical or unsubstantial objections. In construing them resort may be had to the deed or instrument to which they are appended." Authorities announcing the same rule could be greatly multiplied. I have found none to the contrary. So that it seems if the authorities are to be followed, it is not such a very "startling thing" after all, for a court to read a certificate in connection with the deed; construe them together, and doing this reject any repugnant word which, upon inspection of both deed and certificate, would obstruct and defeat the obvious intention of the parties. The Supreme Court of the United States, speaking of such certificates, say: "Instruments like this should be construed if it can be reasonably

done, *ut res magis valeat quam pereat.* It should be the aim of courts in cases like this to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual, according to the honest intent of the parties. Roe v. Trannar, Nilles, 682; Kelly v. Calhoun, 05 U. S. 710. Applying to the case at bar the rules announced in Samuels' Case, *supra*, and in other cases cited, I read the certificate of acknowledgment. Apparently it was acknowledged by Francis R. Long, as sheriff of Clay County, but resorting as I lawfully may to the deed upon which that certificate is indorsed, I find that Long, having previously levied the execution on the property in controversy, had gone out of office and turned over the *fi. fa.* to Gittings as his successor; that the latter had made the advertisement and the sale, and signed and sealed the deed as the sheriff of Clay County. From this state of facts, patent upon the face of the deed, to what other rational conclusion can I come but that Gittings, and not Long, sheriff of Clay County, was the actual grantor who acknowledged the deed? When you are permitted to resort to the deed in aid of the certificate, all ambiguity vanishes and repugnancy ceases. This is so, and you can not deny it.

Take another view of the certificate and deed. Both bear the same date, April 26, 1865; both have the same design; their mutual dependence and connection appear on comparing, or reading, them together, and, therefore, in the eye of the law, they may be regarded as one instrument, although they do not refer to each other in terms. Whittelsey v. Delaney, 73 N. Y. 571, and cases cited; 2 Smith's Lead. Cas., 259, and cases cited; Noell v. Gaines, 68 Mo. 649; Waples v. Jones, 62 Mo. 440; Brownlee v. Arnold, 60 Mo. 79. Following the authorities just cited, and treating the deed and certificate as one instrument, we may reject from the certificate the name of Long as the acknowledger, as being repugnant to the evident meaning and intent of the instrument; for still, after such rejection, enough will be left to constitute a good and valid sheriff's deed, properly acknowledged by the sheriff of Clay County. Thus, applying another maxim: "*Falsa demonstratio non nocet.*" 2 Smith's Lead. Cas., 468, 472, and cases cited. And this maxim applies as well to persons as to things. The description of the person who acknowledges the deed being true in part, to wit: that he was the sheriff of Clay County; but not true in every particular, to-wit: that his name was Long. 1 Greenlf. Evid., sec. 301. The sole ground of objection, as before stated, made by plaintiff to the deed, and the certificate of April, 1865, when first offered, was that heretofore mentioned, and no objection was then made that it was a copy. So that the case then stood as if the deed had been the original one. If either of the above positions I have taken be correct, the deed was properly admitted to record, and if so imparted constructive notice to all subsequent purchasers. Besides, plaintiff admitted, both in his reply and on the trial, that the copy offered was a certified copy, and, according to the statute (sec. 2302), was evidence, since the original was proven to have been lost. Why, then, speak of this copy as an "assumed" copy?

2. But granting that the deed was improperly admitted to record and therefore imparted no constructive notice, still the only party who could take advantage thereof, would be what the books call an "innocent purchaser." And if plaintiff did not occupy this position, then the reacknowledgment of the sheriff's deed by Gittings in 1878 vested the title in the bank and Reid by relation. Much intellectual ammunition has, as I think, been wasted in the majority opinion about the deed being only a copy. The original being lost, a copy thereof, containing the proper recitals, was to all intents and purposes a new deed, and the sheriff, by acknowledging the deed and recognizing as his signature the name signed to the copy, made that signature his own. This point certainly will not be disputed.

3. The next thing for consideration is whether plaintiff was an innocent purchaser. I will consider this matter from two points of view: 1st, as a question of pleading; 2d, as a question of evidence. And first, as to the question of pleading: In Halsa v. Halsa, 8 Mo. 303, Hart, a defendant, had pleaded in his answer that he was an "innocent purchaser without notice of any conflicting claims."

Scott, J., in speaking of the insufficiency of this answer, approvingly cites Frost v. Beekham, 1 Johns. Ch. 288, where Chancellor Kent says: "If a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny notice, though it be not charged; he must deny fully, and in the most precise terms, every circumstance from which notice could be inferred." And the party who in apt terms pleads that he is such a purchaser, must prove it; the *onus* is on him. Jewett v. Palmer, 7 Johns. Ch. 65. In Story's Eq. Plead., sec. 805, it is stated that a party can not set up a *bona fide* purchase for value at the hearing, unless formally pleaded or set up by way of answer, as any other defense; and in denying notice as the foundation of superior equity, the plea or answer must not only negative such notice in general terms, but in specific terms as to all circumstances upon which it is claimed in the bill; and the plea must deny notice of plaintiff's title and claim previous to the execution of the deed or payment of consideration, and must deny notice of plaintiff's title, and not merely the existence of a person who could claim under it. Plaintiff's reply to Mrs. Thompson's answer falls far short of the standard. He simply says that "he never had any notice or information whatever, at or before the date of his said purchase of said real estate at sheriff's sale, in the year 1870, of any claim of title to the land in dispute by the Farmers' Bank of Missouri and John Reid or Emily W. Thompson." But he does not

deny notice of the Clay County judgment, execution thereon, levy, sale, return, sheriff's deed to the bank and Reid, the acknowledgment and recording thereof. Knowledge of these he virtually admits, contenting himself with averring their nullity. He does not aver payment of purchase-money, nor that his bids were credited on the judgment, nor when he received his deed, nor deny notice at these periods. Even upon the pleadings, then, according to the authorities cited, he is not an innocent purchaser, and consequently has no right to prove what he has not pleaded. The question is *dehors* the case. 2d. Conceding, however, plaintiff's reply to be unexceptionable, his evidence would not support it. The *onus* being as before stated, he has fallen as far short in his evidence in this regard as he did in his pleading. Granting that plaintiff himself was without notice of Mrs. Thompson's rights, a debatable question, as will be presently seen, I can not help regarding Jas. E. Lincoln as the attorney of his brother, when the sale under the foreclosure occurred. The plaintiff does not deny that his brother was his attorney, and on his shoulders rests the burden of proving lack of notice. He did not deny that he knew his brother was prosecuting his claim; and if he did not disaffirm the acts of his attorney, he ratified them, and that ratification related to the time of the act done. And Jas. E. Lincoln does not make it appear that he was not his brother's attorney. He says: "I can not say I was a regular attorney for plaintiff till I brought the ejectment suit in 1871." Yet he states: "I looked out for a chance to make my brother's debt all I could. He never instructed me to do so, but I supposed as a matter of course, he wanted to make his money." Yet he admits he brought a suit in 1867 to revive the judgment lien under which plaintiff bought; that he instituted garnishment proceedings, and had executions issued in behalf of his brother. Was all this done without authority, either express or implied? There is nothing in this record which induces me to doubt that his brother either directly or else indirectly sanctioned every step taken by his "irregular" attorney. If no such sanctioning occurred, it was a very easy matter for plaintiff to have interposed a denial when on the witness stand, and he was bound to do this if he desired to maintain the position of being an innocent purchaser. I am persuaded, therefore, that Jas. E. Lincoln must be regarded as plaintiff's attorney, and if he occupied this relation then notice to him was notice to plaintiff. And there is abundant evidence in this record showing notice to Jas. E. Lincoln. He was present at the foreclosure sale, he heard the announcement made by the sheriff, by Gen. Doniphan and by Judge Norton of the agreement entered into between the mortgage creditors and Mrs. Thompson for her relinquishment of dower. Whether he knew of "any written dower agreement nor what that agreement was" does not signify. He heard the announcement made in the most solemn manner at the sale. He purchased at the sale, took a deed and received in that the relinquishment of Mrs. Thompson's dower. After all this it is futile for him to say he was unapprised of Mrs. Thompson's rights. He either had knowledge or notice of those rights or else abundant provocation and reason to institute inquiry respecting such rights, and this is sufficient. Surrounded by such circumstances he was grossly negligent if he failed to use the clue this furnished him, and gross negligence is tantamount to knowledge, Leavitt v. La Force, 71 Mo. 353, and cases cited. The majority opinion take no note of the fact of Jas. E. Lincoln being plaintiff's attorney, nor of his testimony in that regard, nor of notice communicated to him in manner as aforesaid.

4. The foregoing are only a few of the reasons which might be urged to sustain the action of the court below. A more righteous judgment, one more sound on its basis of facts, and more sound on its basis of law was, in my humble opinion, never rendered in any court of justice. The case of Mrs. Thompson is one of peculiar hardship, and speaks (or rather should speak), to the ear of the court of equity with a most persuasive tongue. "In order" (as she says in her answer), "that she might save a home for herself and her children and receive something to support them on," she is induced to sign the dower agreement, whereby property which would not have brought more than $50,000 at the utmost, yielded $73,000. But for this agreement the foreclosure sale would have swallowed up the whole property, and we should not have heard of plaintiff's "most meritorious title." If these facts do not give Mrs. Thompson a superior equity to plaintiff's, then the sooner we erase that meaningless word of six letters from our vocabularies the better. What, shall a court of equity which favors dower; which clings to substance and discards form; which shelters under its protecting shield, its wards, the widow and the orphan; which does battle for the weak against the mighty, shall such a court, I say, seize with apparent avidity on the "shadow of a shade" of an empty technicality (discountenanced and held for naught by all courts of law) and thus deprive a poor widow of her home and her dower's worth? I regret to say that, in this instance, the above interrogatory is answered in the affirmative. Over in Illinois, however, where, in an equitable proceeding for dower, it appeared that the sheriff's deed—regular in other respects—granted to the husband "all of the right, title and interest which he and the other plaintiffs in the execution had in the lot" sold, the court said: "This is but a clerical error, which will not be regarded by a court of equity, or any court, while acting upon and adjusting equitable rights. Stow could at any time have had the mistake corrected by procuring a conveyance from the proper officer. This mistake in no wise changes the rights of the parties to this proceeding." Stow v. Steel, 45 Ill. 328. The "strong meat" of this equitable doctrine

would doubtless be repudiated here. Moreover, Mrs. Thompson clearly has a dower right in the premises in controversy, if the dower agreement as to those premises is to go for nothing, as this court declares. But this right seems not to have arrested attention in the majority opinion; but an iron-bound decree is to be entered by the circuit court, and no account is to be taken of that dower right so far as appears in the mandate of this court.

I leave off by saying that, after a careful consideration of this whole case, I am for affirming the judgment of the circuit court.

CRIMINAL LAW — PLEADING — INDICTMENT—VARIANCE.

STATE v. NICHOLS.

Supreme Court of Indiana, October 10, 1882.

An indictment charging the defendant with living in a house of ill-fame is sufficient, although the statute upon which it is based only provides that it is an offense to live "in houses of ill-fame." The singular number may be comprehended in the plural when it is the obvious intention of the legislature that it should be so understood or used.

D. P. Baldwin, Attorney General.

NIBLACK, J., delivered the opinion of the court:

This was a prosecution under section 2003 of the Revised Statutes of 1881.

The body of the indictment was as follows: "The grand jurors for the County of Allen, and State of Indiana, upon their oath charge and present that, on the 1st day of July, A. D., 1882, Martha Nichols, a female of said County of Allen, and State aforesaid, did unlawfully live in a house of ill-fame, and divers other days and times before the 1st day of July, 1882, said Martha Nichols, a female, did unlawfully live in said house aforesaid, being then and there situate on lot No. 14 of C. Evans' addition to the City of Fort Wayne, in said County and State."

On a motion to quash the indictment, it was held to be insufficient, and the defendant was discharged.

So much of section 2003, *supra*, as is material to this prosecution, is as follows: "Any female, who frequents or lives in houses of ill-fame * * * * shall be deemed a prostitute, and, upon conviction thereof, shall be fined not more than fifty dollars, nor less than five dollars, to which imprisonment in the county jail may be added."

The prosecuting attorney informs us that the court quashed the indictment in this case because the charge that the appellee had lived in a single and particular house of ill-fame, did not render her amenable to the provisions of the statute, set out as above, making it a misdemeanor to live in *houses* of ill-fame, upon the theory that in such a case the plural does not either import or include the singular number, in the description of the offense.

Bishop on Statutory Crimes, at section 213, says: "The singular number, likewise, may be comprehended in the plural, as where a statute makes it a felony to purloin from a post-office 'bank notes,' it is within the prohibition to steal a single note, or to commit larceny of 'bills obligatory,' a person who takes a single bill obligatory, breaks the provision, and, if it is made an offense 'to keep open tippling *houses* on the Sabbath day,' the offense is committed by keeping open one tippling house."

The rule of construction there laid down by Bishop seems to be well supported by some carefully considered cases, and is one which we think ought to be followed in the case at bar, as being in accordance with the obvious intention of the legislature. Hall v. State, 3 Kelly (Ga.), 18; Commonwealth v. Messenger, 1 Binney, 373.

We are, consequently, of the opinion that the motion to quash the indictment ought to have been overruled.

The judgment is reversed with costs, and the cause remanded for further proceedings.

DEED — EXECUTED IN BLANK — CONSTRUCTIVE TRUST—EQUITY.

LOCKWOOD v. BASSETT.

Supreme Court of Michigan, January 5, 1883.

1. Where a married woman and her husband executed a deed in blank to her brother of some property to hold for her, and he paid her upon delivery a sum of money which was used in paying off incumbrances, and upon the death of such brother his administrator filed a bill to subject the land to a lien, in the nature of a mortgage, for the money so paid, *held*, that the lien was valid, and should be enforced.

2. Without passing upon the merits of the conflict of authorities as to whether or not a deed executed in blank can be subsequently rendered effectual by the blanks being, by the special authorization of the grantor, it was held that where a married woman and her husband executed a deed to certain property of her husband's, leaving the grantee's name blank, and the defendant with whom the deed was left to use for her personal benefit subsequently had the name of her brother inserted as grantee, and delivered the deed to him, and afterwards received a conveyance from her husband of all his interest in the land, it was *held* that the deed to defendant's brother was effectual to convey the legal title.

Appeal from Wayne.

C. J. O'Flynn, for complainant and appellant; *Aikman & Walker* and *C. J. Walker*, for defendants.

COOLEY, J., delivered the opinion of the court:

The complainant, as administrator of Chauncey M. Lockwood, claims a lien in the nature of a

mortgage under a deed given by the defendants Sarah M. Bassett and Henry Bassett, her husband, to the intestate of certain lands, the title to which at the date of the deed was in the husband. The lien which is claimed is for the sum of $8,000, which it is conceded by the defense was had by Mrs. Bassett from the intestate, who was her brother. But Mrs. Bassett insists that the money was a gift to her from the intestate; and the case, so far as it rests upon the facts, turns mainly upon this gift. But she also claims that the deed, when executed and acknowledged by the husband, contained no name of a grantee, and that the name of the intestate was afterwards inserted and the deed delivered without the husband's consent. This being so, it is argued that the deed is inoperative for any purpose. This statement sufficiently indicates the issues. Henry Bassett has since conveyed to his wife any interest he may have had in the lands, so that his rights are no longer in question.

We have carefully searched the record of the case for evidence of the gift Mrs. Bassett relies upon, and are forced to the conclusion that it is not proved. Discarding such of her own evidence as is incompetent, because relating to facts which, if they existed, must have been equally within the knowledge of the intestate, we find nothing of a satisfactory character to support the defense. We think it fails entirely.

It remains to be seen whether the lien which is relied upon by the complainant can be supported, in view of the undoubted fact that the deed, when executed by Henry Bassett, contained no name of grantee. The facts, as we think, are, that Bassett executed the deed in that form and delivered it to his wife in order that she might thereby be enabled to dispose of the land in her own interest, and that she subsequently had the name of Chauncey M. Lockwood inserted as grantee and delivered it to him. Whether the delivery was expressly made by way of pledge, for the money obtained, is not so certain, but it is shown without dispute that Chauncey was to hold the land for his sister, and the payment of the money by him was the occasion and the inducement for the delivery of the deed.

Many cases hold that a deed executed and delivered with a necessary part left in blank is ineffectual as a conveyance, though afterwards the blank is filled. Hibblewhite v. McMorine, 6 Mees. & W. 200; United States v. Nelson, 2 Brock. 64; Chase v. Palmer, 29 Ill. 206; Whitlake v. Miller, 83 Ill. 381; Williams v. Crutcher, 6 Miss. 71; Davenport v. Sleight, 5 Dev. & B. 381, Cross v. State Bank, 5 Ark. 525; Viser v. Rice, 33 Tex. 139; Heath v. Nash, 50 Me. 378; Wunderlin v. Cadazan, 50 Cal. 613; Burnes v. Lynde, 6 Allen, 305; Ingram v. Little, 14 Ga. 73; Lindsley v. Lamb, 34 Mich. 509. But other cases hold that if the filling of the blank is by express authorization of the grantor, this is sufficient even though the authority is by parol. *Ex parte* Kirwan, 8 Cow. 118; Vleet v. Camp, 13 Wis. 198; Van Etter v. Evensom, 28 Wis. 33; Schurtz v. McManamy, 33 Wis. 299; Ragsdale v. Robinson, 48 Tex. 379; Pence v. Arbuckle, 22 Minn. 417; Field v. Stagg, 52 Mo. 534.

In Iowa where there are like decisions importance is attached to the fact that the statute, does not make a seal essential to a deed. Swartz v. Ballou, 49 Iowa, 188; McClain v. McClain, 52 Iowa, 274; s. c., 3 N. W. Rep. 60. In this State the statute declares that a deed shall not be invalid for want of a seal. Comp. Laws, sec. 6194. But in this case it is not necessary to decide whether a parol authority to fill a blank after delivery is or is not sufficient, for the facts do not raise the question. The blank in this case was filled before delivery; and when the delivery is by the grantor himself, or by his direction, the deed as then completed is adopted by him. No one does or can dispute this. Even if the blank were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own, and preclude himself from objecting to the invalidity afterwards. Duncan v. Hodges, 4 McCord, 239.

In this case no express authority from Henry Bassett to fill in the name of Chauncy M. Lockwood, or to raise money by a pledge of the title is shown. But it is shown by the defense that the deed as executed in blank was placed in Mrs. Bassett's hands to be made use of exclusively for her own advantage, and very strong equities in her behalf are proved as a reason for this. The purpose, therefore, was to put the legal title at her disposal as the equitable owner, and when she delivered the deed she did so not in her husband's interest but in her own. She was a party to a deed, and if the title had been in her, the conveyance would unquestionably have been sufficient, but as all the equities were then in her and she has since obtained a conveyance from her husband, she must, we think, be held concluded to the same extent as she would have been if the legal and equitable estates had been united in her when the deed was delivered.

Another view of this case is equally conclusive against the defense. The money obtained from Chauncy M. Lockwood was advanced for the purpose of paying off existing incumbrances upon the lands described in the deed, and was directly and immediately applied to that object. If, under such circumstances, the deed in reliance upon which the advancement was made, should be contested and adjudged invalid, Chauncy M. Lockwood might justly claim to be subrogated to the rights of the mortgagees whose liens his money had discharged, and on the facts as they are disclosed by the record, he would be entitled to a decree of foreclosure.

The complainant should have the relief sought, with the costs of both courts.

The other justices concurred.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—DEFECT OF PARTIES—EJECTMENT BY TENANT IN COMMON AGAINST DISSEIZOR.

In ejectment by a tenant in common against a mere disseizer, to recover possession of an undivided premises, he may maintain the action in his own name, if no objection is made for defect of parties. As the recovery of possession inures to the benefit of all, a failure to plead a defect of parties plaintiff is a waiver of that objection. *Crook v. Vandervoorts*, S. C. Neb., Dec. 30, 1882; 14 N. W. Rep. 470.

2. ALTERATION OF INSTRUMENT—MATERIAL.

Where, by the terms of a promissory note, it was not to draw interest, and the payee, without the consent of the maker, adds the figure "7" to the note to indicate the rate of interest, *held*, to be a material alteration, and to avoid the note. *Davis v. Henry*, S. C. Neb., Dec. 30, 1882; 14 N. W. R. 522.

3. BOND — PUBLIC OFFICER — SURETIES — TERM COVERED BY BOND.

The sureties of a revenue collector are responsible for moneys collected during the term covered by their bond, although from assessment rolls received during a prior term, and also for moneys remaining in his possession from a prior term; and the Treasury transcripts are *prima facie* evidence of the amount and date of the indebtedness and the manner in which it arose. It was competent for the sureties to show in their exoneration that credit had been given the collector in prior settlements which should have been credited on the transactions of their period, and the transcript showing such facts were admissible in evidence. *United States v. Stone*, U. S. S. C., Dec. 4, 1882; 5 Morr. Trans. 363.

4. CONFISCATION—SALE—TITLE ACQUIRED.

1. Under the act of August 6, 1861, "to confiscate property used for insurrectionary purposes," the purchaser at a sale takes a fee and not simply a life estate. 3. This act authorized the confiscation of property, treating it as the guilty subject, as a means of weakening the enemy and not as a punishment of the owner; and it could on this ground constitutionally forfeit the fee. 3. In this respect it is different from the act of July 17, 1862, which imposed a forfeiture as a punishment for treason, and which, therefore, could only forfeit the life estate. *Kirk v. Lynd*, U. S. S. C., Dec. 4, 1882; 5 Morr. Trans. 375.

5. CONSTITUTIONAL LAW — PROHIBITORY AMENDMENT.

In 1877, the defendant erected a brewery, and has since operated the same in manufacturing beer, an intoxicating liquor. In 1881, after the taking effect of both the constitutional amendment relating to intoxicating liquors and the present prohibitory liquor act (laws of 1881, ch. 128), the defendant manufactured beer, and also sold beer without having any permit giving him any authority to do either. The sale, however, was of beer which he had manufactured prior to the taking effect of the said prohibition act. *Held*, that the said prohibition act is not unconstitutional; but that it is constitutional and valid so far as it effects the defendant; and that the defendant committed a public offense, both in the manufacture of the beer, which he manufactured after the taking effect of the prohibition act and in the sale of the beer, which he sold after the taking effect of such act. *State v. Mungler*, S. C. Kan

6. CONTRACT—FRAUD—CONCEALMENT.

Where a merchant is insolvent and has been, to use his own words, "Going down for several years," and of this fact he fails to advise the vendors at the time of his purchases, and continues to buy on credit to keep his usual and ordinary stock, his omission to disclose his actual condition to his vendors is not a fraud for which the sales may be voided, or such bad faith as constitutes in law a fraudulent contracting of the debt if he did not purchase with the preconceived design not to pay therefor. *Kelsey v. Harrison*, S. C. Kan.

7. CONTRACT — NOTE — CONSIDERATION — NAMING CHILD—EQUITY.

Appellant sued on a note for $10,000, executed by appellee's intestate, Charles Lehman. The reply, to which a demurrer was sustained, shows that the note was executed in consideration of $40 paid to Lehman, certain services rendered to him by appellant, such as driving him out occasionally in a carriage, and the bestowing on appellant's son the name of the intestate, the latter declaring his intention to provide generously for the child's care and education if his father would so name him. It is a general rule that where there is no fraud, and a party gets all the consideration he contracted for, the contract will be upheld. There are two exceptions to this rule; first, where the sole consideration is money, and the amount is greatly disproportioned to the value of the promise; second, when the consideration is so grossly disproportionate to the value of the promise as to indicate fraud and shock the conscience. But under the second head the courts really interfere upon the ground of fraud, and not of inadequacy of consideration. They never interfere unless the inadequacy is so gross as to amount to fraud and oppression. Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should not be disturbed unless there is evidence of fraud. The performance of service for the intestate was a legal consideration for the note, and so was the surrender by the appellant of the privilege of naming his child. *Wolford v. Powers*, S. C. Ind., Jan. 12, 1883.

8. CRIMINAL LAW—PERJURY—MATERIAL MATTER.

A person accused of a crime offered himself as a witness, and on cross-examination swore falsely that he had not been in State prison. *Held*, that the statement was "material matter" within the statute as to perjury. *United States v. Lansberg*, U. S. C. C., S. D. N. Y., December 22, 1882; 15 Rep., 42.

9. DISTRICT OF COLUMBIA — FORECLOSURE OF DEEDS OF TRUST—UNSATISFIED BALANCE.

Section 808 of the Revised Statutes relating to the District of Columbia, applies to suits for the foreclosure of deeds of trust in the nature of mort-

gages to secure the payment of money, and authorizes a decree against the debtor defendant for the unsatisfied balance of the debt remaining after the application thereto of the proceeds of the sale of the trust property, and an order for execution thereof as at law. *Dodge v. Freedmen's Sav. Bank*, W. S. S. C., Dec. 11, 1882; 5 Morr. Trans., 386.

10. EQUITY — HE WHO ASKS EQUITY MUST DO EQUITY.
In 1872 a decree of foreclosure for the sum of $1,866.60 was rendered against B and wife and in favor of B & Co. In 1873 the wife of B recovered a judgment for the sum of $872.60 against M & M, which was stayed. After the expiration of the time for reviewing the case on error, no bill of exceptions having been signed or filed, B & Co. accepted $400 and released a portion of the mortgaged premises, and received the judgment against M & M for the remainder. Afterwards the attorney for B and wife, in pursuance of a secret agreement with the attorneys of M & M, agreed that a bill of exceptions should be signed in that case, and filed as of the date of the rendition of the judgment. The judgment was thereupon taken to the Supreme Court and reversed, and, on a new trial, judgment was rendered in favor of M & M. *Held*, that B & Co. were entitled to enforce the decree of foreclosure to the extent of the judgment against M & M. *Bax v. Hoagland*,, S. C. Neb., Dec. 30, 1882; 14 N. W. Rep., 514.

11. MALICIOUS PROSECUTION — COLLECTION OF DEBTS BY CRIMINAL PROCESS.
In an action for malicious prosecution, where the testimony shows that the object of the criminal proceedings was not to vindicate the law and punish crime, but to coerce the payment of a debt, a malicious motive may be inferred. *Ross v. Langworthy*, S. C. Neb., Dec. 30, 1882; 14 N. W. Rep., 515.

12. MALICIOUS PROSECUTION—PROBABLE CAUSE — CONVICTION BEFORE JUSTICE SUBSEQUENTLY REVERSED.
In an action for malicious prosecutton for causing a criminal action to be instituted agai st plasntiff for an assault with intent to kill, and after such action was abandoned instituting a second action for assault and battery, in which the plaintiff was found guilty in a trial before a justice of the peace, but subsequently acquitted on an appeal to the circuit court, the conviction before the justice is not evidence of probable cause to charge the first and graver offense. *Labar v. Crane*, S. C. Mich., Jan. 5. 1883; 14 N. W. Rep. 495.

13. MORTGAGE — FORECLOSURE—DEFECT OF PARTIES.
A held a mortgage executed by B and his wife C upon real estate owned by B to secure a promissory note executed by B and C. B died seized in fee simple of the real estate, leaving his heirs C and three children: A then foreclosed the mortgage, but made C the only defendant; at sheriff's sale he purchased the property for a sum less than the judgment, and after the sale C conveyed other property to A in full satisfaction of the balance due on the judgment and costs. *Held*, the judgment of foreclosure did not divest the children of B, deceased, of their title or estate in the property, and in an action brought by said heirs to partition the property, neither A nor his grantee could ask for a foreclosure of the mortgage against said heirs, as the debt secured thereby had been paid, and the said heirs were not called upon to redeem from the mortgage, as no lien of judgment existed against the property. *Curtis v. Parker*, S. C. Kan.

14. NEGLIGENCE—DEFECT IN CITY STREET—PERSONAL INJURY.
Plaintiff was driving on a load of hay, and while crossing a gutter the load upset, throwing plaintiff to the ground, and causing the injuries complained of. *Held*, that the jury were not warranted in finding negligence in the establishment of the grade or the plan or method of construction of the gutter. *Held*, where, on a declivity in a city, several streets intersect, and are paved and worked in accordance with an established grade which does not appear, and is not shown by evidence to be defective, the mere fact that a cross walk and stone gutter eight feet wide parallel with it, otherwise properly constructed and not out of repair, crosses one of the streets (a side street) at an angle a little less than ninety deg., and the middle of the gutter for a space of about thirty feet in the middle of such street has a depression only of from five to six inches, and outside of that space a depression of only eight to nine inches, the same does not constitute such a defect as to render the city liable. *Baker v. Madison*, S. C. Wis., Dec. 12, 1882; 5 Wis. Leg. N., 138.

15. PAYMENT—VOLUNTARY PAYMENT—RECOVERY.
When a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts on which the demand is founded, he can never recover back the sum he has so voluntarily paid. A payment of taxes is not compulsory because made under a threat, express or implied, that the legal remedies for its collection will be resorted to. A voluntary payment of money, under a protest, to prevent the sale of lands, under a threat te sell the same on a judgment which is not a lien thereon, can not be recovered back by reason thereof. *Union Insurance Co. v. City of Allegheny*, S. C. Pa., Nov. 20, 1882; 13 Pittsb. L. J., 213.

16. REVENUE LAWS—IMPORT DUTIES —"COTTON-TIES" NOT "HOOP IRON."
1. Cotton-ties, each tie consisting of an iron strip and an iron buckle, imported in bundles, each bundle consisting of thirty strips and thirty buckles, each strip eleven feet long, the whole blackened, were held in this case to be subject to a duty of 35 per cent. *ad valorem*, as "manufactures of iron not otherwise provided for," under schedule E of section 2504 of the Revised Statutes, and not to a duty of one and a half cents per pound, under said schedule, as "band, hoop and scroll iron." 2. The question as to whether the articles were subject to some other rate of duty than one of those two not having been raised on the trial in the court below, can not be raissd by the plaintiff in error in this court. *Badger v. Ranlett*, U. S. S. C., Dec. 11, 1882; 5 Morr. Trans., 380.

17. SUNDAY LAW—BOND SIGNED BY SURETY ON SUNDAY—INNOCENT OBLIGEE.
Where a bond was signed by the surety on Sunday, and on that day delivered by him to the principal, who aftewards on a secular day delivered it to the obligee, who accepted it without notice of such facts, the surety was bound. The ground upon which courts refuse to maintain actions on contracts made on Sunday is that one who participates in a violation of the law can not assert any right growing out of such contract. But a party who has not himself violated the law is not precluded from enforcing the contract. To bring the

case within the statute the contract must have been fully executed on Sunday, and the bond not having been delivered on Sunday it was not executed on that day. A surety who authorizes his principal on Sunday to deliver an instrument signed by him on that day is barred by such delivery. *Evansville v. Morris*, S. C. Ind., Jan. 11, 1883.

18. USURY—BURDEN OF PROOF.

Where a loan of $350 was made by the C Banking Company, and $70 retained for commission, and the testimony of the plaintiff showed that, in addition to ten per cent. interest, the borrower was to pay certain other expenses to the banking company: *Held*, that as the amount paid by the borrower to the banking company greatly exceeded twelve per cent., it devolved on the plaintiff to show that the value of said services rendered to it, when added to the ten per cent. reserved, did not exceed the maximum rate. *New England Mortgage Secy. Co. v. Harris*, S. C. Neb., Dec. 30, 1882; 14 N. W. Rep., 471.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 1. [16 Cent. L. J. 16.] Mrs. H died at Dubuque, Iowa, July 27, 1877, leaving two sons and five daughters her surviving. On October 17, 1875, A, one of her sons, made a promissory note to his mother, due in one year. No administration was had upon her estate. B, her other son, who lived with his mother, discovered this note among her papers after her death, and now holds the same. A admits the genuineness of the note, and that it is unpaid. What is B's remedy to collect said note? Cite authorities. T. J. B.

Answer. After the death of an intestate, his personal property is in abeyance till administration granted, and is then vested in the administrator (Jewitt v. Smith, 12 Mass. 309; Lawrence v. Wright, 23 Pick. 128), including negotiable bills and notes payable to or held by the deceased. Rawlinson v. Stone, Willes, 559; S. C., 3 Wilson, 1. The heirs or next of kin of an intestate have no such ownership of choses in action belonging to the deceased, as will enable one, or all of them together, to sue thereon. Edwards v. Campbell, 23 Barb. 423; Loansbury v. Depew, 28 Barb. 44; Heidentheimer v. Wilson, 31 Barb. 636; Woodin v. Bagley, 13 Wend. 453; McLean v. Long, 9 Cent. L. J. 291. B can not collect the note until he shall take the administration. A voluntary payment made by A to B would be no defense to an action by an administrator. Tucker v. Ronk, 43 Iowa, 80.

D. L. A.

Query 2. [16 Cent. L. J. 16.] A executes mortgage on land owned by him. Afterwards he conveys to B. The deed to B contains a stipulation that the land is subject to said mortgage, and that B shall pay the same as part of consideration. Afterwards A releases B from all obligation by reason of said stipulation. The mortgagee was not a party to, and had no knowledge of the arrangement until after said release. Can the mortgagee, after such release, hold B liable personally for deficit still unpaid after exhaustion of mortgagee's premises? In other words, had the mortgagee such a vested right in the arrangement as to place it out of the power of the parties thereto, to rescind the same? Answer will please cite authorities. ?

Answer No. 1. Two different views obtain in regard to the nature of such contracts as are here referred to: One, which seems to prevail in New York, Iowa, Indiana and Ohio, regards them as made for the benefit of the mortgagee, and which afford a valid basis for a direct claim by the mortgagee against the purchaser thus holding the mortgage debt for his use. Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178; Miller v. Winchell, 70 N. Y. 437; Thompson v. Bertram, 14 Iowa, 476; Garnsey v. Rogers, 47 N. Y. 233; Ross v. Kennison, 38 Iowa, 396; Mansur v. Bartholomew, 63 Ind. ——; Thompson v. Thompson, 4 Ohio St. 333. The other construes the contract as one by which the grantee becomes principal debtor and the grantor his surety, the benefit of which inures to the mortgagee by equitable subrogation. This view of the contract does not contemplate an obligation from the grantee to the mortgagee, but only a promise from the former to the mortgagor which may in equity be taken advantage of by the mortgagee. This theory prevails in Michigan, Massachusetts and New Jersey. Higman v. Stewart, 38 Mich. 523; Pettee v. Peppard, 120 Mass. 522; Crowell v. Currier, 27 N. J. Eq. 152. Where the first view obtains, there may be some reason for holding that such an agreement is unconditional and irrevocable, and in Garnsey v. Rogers, 47 N. Y. 233, 242; 7 Am. Rep. 440, there is a dictum to that effect. But it would seem that the assumption of the mortgage becomes irrevocable as to the mortgagee only after he has knowledge of the agreement and has by his acquiescence and acceptance made himself a party to it. Whiting v. Gearty, 14 Hun (N. Y.), 498; Kelly v. Roberts, 40 N. Y. 432; Durham v. Bischof, 47 Ind. 211; Simson v. Brown, 6 Hun (N. Y.), 251. In those States where the last-named rule finds support, it would seem that the mortgagee can only avail himself of the benefits of the contract where it is in force at the time the mortgagee's right accrues to foreclose the mortgage, and that the contract was revocable until the mortgagee had acted upon it. Thus in Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, it is said: "The mortgagee, being the representative of, and standing in the place of the mortgagor to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled to such remedy only as the mortgagor himself had against the purchaser when the bill is filed. In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it is founded, it will be competent for those who were parties to it, to rescind and extinguish it at their pleasure; and after such rescission and extinguishment, the contract becomes utterly incapable of enforcement." Under either theory, therefore, it would seem that the query must be answered in the negative.

Battle Creek, Mich. F. R. M.

Answer No. 2. The law upon the proposition embraced in this question is in a chaotic state. The *qvære* should receive an answer in the essay columns of this journal, from some one who has the time and ability to discuss the cases and the principles involved. An examination of the authorities which I shall cite, will show such dissension among the

courts, as well as among the judges of the same court, such opposing reasons, and diverse theories and conclusions, that it can not be said that any rule or any principle has been adopted or settled. In New Jersey such a release is good unless fraudulently made. Crowell v. Hospital, 27 N. J. Eq. 650; O'Neill v. Clark, 33 N. J. Eq. 444; Trustees v. Anderson, 30 N. J. Eq. 366. Seems not good in Missouri. Klein v. Isaacs, 8 Mo. App. 568; Fitzgerald v. Barker, 70 Mo. 685. In New York: Grantor may release. Stephens v. Casbacker, 8 Hun, 116. If he does so for value and before acceptance by the mortgagor. Whiting v. Grasty, 14 Hun, 498; Dunham v. Bischof, 47 Ind. 211. That he can not do so. Douglas v. Wells, 18 Hun, 88; S. C., 57 How. 378, P. J. dissenting; Ranny v. McMullen, 5 Abb. N. C. 246; *Dicta* of Rapallo, J., Garnsey v. Rogers, 47 N. Y. 242. The question has been discussed, but never decided, in the Court of Appeals, but the drift of the *obiter dictum* is that the grantor can not release the grantee. Hartley v. Harrison, 24 N. Y. 171; Kelly v. Roberts, 40 N. Y. 432; Garnsey v. Rogers, 47 N. Y. 233; Simson v. Brown, 68 N. Y. 355. See also Devlin v. Murphy, 56 How. 326; Fleischauer v. Doellner, 58 How. 190. The New York cases which maintain that a release by the grantor is unavailing, go upon the ground that a promise for a valuable consideration made by A to B to pay a sum of money to C, inures at once to the benefit of C, presumes an acceptance by him, and vests in him a right of action against A, although C was not privy to the consideration. 20 N. Y. 268; 17 Mass. 400, 575. When this doctrine that a person may maintain the action upon a promise as to the consideration of which he is in no way privy, is admitted, the deduction may well follow that the grantor has no power to release. But if, as in New Jersey, the grantee's covenant be regarded only as an indemnity to the mortgagor, against the debt, of which the mortgagee may avail himself in equity by way of subrogation, then it follows that the mortgagor may release before action. It may be noted that the grantee may defend an action by the mortgagee, by showing his promise was obtained by fraud, or by showing failure of consideration. Benedict v. Hunt, 32 Iowa, 27; Fuller v. Lamar, 53 Iowa, 477; Dunning v. Leavitt, 85 N. Y. 30. As Lucius O'Trigger says: "It is a very pretty quarrel." Lord Abinger, 9 M. & W. 505. D. L. A.

Sherburne, N. Y.

Query 4. [16 Cent. L. J. 16.] Can the confession of one party to incest ever sustain a criminal prosecution against that party without other testimony?

Keokuk, Iowa. H.

Answer. The result of modern authority is decidedly that an extra-judicial confession is not sufficient to sustain a conviction for a felony, without proof of the *corpus delicti*. There must be some further proof that the offense has actually been committed. Such convictions have been sustained even in capital cases. 2 Stark. on Ev., 39; 2 Russ. Cr., 825. But, as before said, the rule is now the other way, especially in this country. 1 Greenlf. on Ev., sec. 217; 1 Whart. Cr. L., sec. 683; People v. Hennessy, 15 Wend. 147; People v. Badgley, 16 Wend. 53; People v. Porter, 2 Park. —; 4 Park. 164; Matthews v. State, 55 Ala. 187; S. C., 28 Am. Rep. 698; State v. German, 54 Mo. 526; S. C., 14 Am. Rep. 481; May v. People, 92 Ill. 343. Case of incest no exception. Bergen v. People, 17 Ill. 426. D. L. A.

Query 9. [16 Cent. L. J. 38.] In your issue of November 17, 1882, I see an article on Equitable Consideration, in which the rule is stated that if one, after being discharged in insolvency, makes a new promise to pay the debt, such promise is binding. That is, no doubt, the general rule. But suppose I consent that the insolvent debtor be discharged, does this not amount to such a voluntary release of my debt that I am forever barred from suing for its recovery, although I receive a new promise? Or, in other words, is there such an equitable consideration as will sustain a new promise? G.

Boston, Mass.

Answer. An answer to this query may be found in the article referred to. The general rule is there laid down that a new promise to pay a debt barred by a discharge in bankruptcy is binding; but it is also stated that the rule is usually limited to cases where the original debt is barred by act of law, and that "where it has been extinguished by act of the parties, a new promise founded on no other consideration may be binding in morals, but is not in law." 15 Cent. L. J. 386. So where a composition with creditors is made, or the creditor enters into a voluntary agreement for the debtor's discharge in bankruptcy, it is considered in the nature of an accord and satisfaction, and most of the authorities agree in holding a new promise in such case not enforceable. Warren v. Whitney, 24 Me. 561; Phelps v. Dennett, 57 Me. 491; Stafford v. Bacon, 1 Hill (N. Y.), 533; Shepard v. Rhodes, 7 R. I. 470; Ingersoll v. Martin, 14 Cent. L. J. 397; Snevely v. Read, 9 Watts, 396. *Contra:* Willing v. Peters, 12 Serg. & R. 188; Stafford v. Bacon, 25 Wend. 384. See, also, on the subject, Valentine v. Foster, 1 Met. (Mass.) 520; Trumbull v. Tilton, 21 N. H. 129. W. F. E.

Indianapolis, Ind.

RECENT LEGAL LITERATURE.

AN ESSAY ON THE GROWTH OF LAW. By Morris M. Cohn. Chicago: Callaghan & Co., 1882.

In the present work the author treats of law in its historic and philosophical aspects showing an extensive and studious acquaintance with German and English writings on the subjects of ethics, sociology and law. With propriety it might have been called a treatise on the philosophy of law. The aim of the writer seems to be to demonstrate that whatever law may be, it is not in any sense arbitrary, but that it is the normal result, at any given time, of past and distinct physical and social agencies. These agencies are constantly changing, and hence the law is in a continual state of growth or development. The author criticises some writers of established reputation with a good deal of freedom; but it must be remembered that in the realm of abstractions, no man is king, nor even an authority; and that metaphysicians, the most refined of civilized thinkers, are, like the fiercest of savage tribes, always in a state of war. In this manner do extremes meet. These conflicts, however, exercise the mind and keep the science from lapsing into disrepute. The book will be read with interest by lawyers who care to go beyond the *ita lex scripta est*. The mechanical execution of the book is of a very creditable kind.

M.